SUPREME COURT, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. A-806

GEORGE NEWSOME and DOYAL CRISWELL,
Petitioners,

vs.

MASON & HANGER-SILAS MASON CO., INC., THE RUST ENGINEERING COMPANY, a Joint Venture, d/b/a MASON-RUST,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America.

Petitioners pray that a Writ of Certiorari issue first to review the order of the United States Court of Appeals for the Eighth Circuit entered on the 31st day of January, 1972, denying the motion of petitioners for leave to intervene in the case of **National Labor Relations Board v. Mason and Hanger-Silas Mason Co., Inc., The Rust Engineering Co., a Joint Venture d/b/a Mason-Rust,** in which

petitioners were the charging parties, but not petitioners below; and second to review the judgment of the United States Court of Appeals for the Eighth Circuit in said case of October 12, 1971, refusing to enforce the order of the Labor Board.

CITATIONS TO OPINIONS BELOW

The opinion of the Court below is reported at 449 F.2d 425, and is set forth in Appendix "A", *infra*. The order of the Eighth Circuit denying petitioners' motion to intervene is set forth in Appendix "B", *infra*; the findings of fact, conclusions of law and decision and order of the National Labor Relations Board are reported at 179 N.L.R.B. No. 71, and are set out in Appendix "C", *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under provisions of the National Labor Relations Act, 29 U.S.C., Sec. 160(e) and 28 U.S.C., Sec. 1254(1).

The judgment of the Eighth Circuit was entered on October 12, 1971. The application of the charging parties and petitioners here for leave to intervene was filed on January 12, 1972, and the order of the Eighth Circuit denying intervention was entered on January 31, 1972. Applications for extension of time to file a petition for writ of certiorari were granted on January 5, 1972 and February 3, 1972, extending the time to and including March 1, 1972. This petition for writ of certiorari was filed within that time.

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in denying the petitioners the right to intervene.

2. Whether the Eighth Circuit, in refusing to enforce the Board's order, misapprehended and grossly misapplied

the standard of review laid down in **Universal Camera Corp. v. N.L.R.B.**, 340 U.S. 474 and **N.L.R.B. v. Walton Mfg. Co.**, 369 U.S. 404.

3. Whether the treatment of the motivation issue by the Eighth Circuit was inconsistent with recent decisions of this Court in **N.L.R.B. v. Great Dane Trailers, Inc.**, 388 U.S. 26.

STATUTES AND RULES INVOLVED

The relevant provision of the Federal Rules of Appellate Procedure for the United States Court of Appeals is Rule 15(d), Title IV. Said Rule is set out in Appendix "D", *infra.*

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) are as follows: Sec. 152(3), Sec. 157, Sec. 158(a)(1), Sec. 158(a)(5), Sec. 160(b) and Sec. 160(e) of said Act. Said sections are set forth in Appendix "D", *infra.*

The pertinent provision of the Rules of the Supreme Court of the United States is Rule 23, Section 5, set out in Appendix "D".

STATEMENT

Pursuant to the National Labor Relations Act, 29 U.S.C., Sec. 151 et seq., the petitioners herein (charging parties below) filed charges and the regional director issued a complaint based thereon against Mason-Rust, alleging that Mason-Rust violated Sec. 8 (a)(1) of the Act by denying employment to petitioners herein because of their engagement in protected concerted activities, i.e. joint efforts to end racially discriminatory hiring practices and secure racially integrated working conditions.

Mason-Rust was engaged in the renovation of the "Gateway" ammunition plant for the United States Government in St. Louis, Missouri. Between February and April, 1968, it had a work force of about 700 employees including over 70 carpenters, all of the carpenters being white.

Petitioners, two black union carpenters, applied for and sought persistently in concert to obtain employment, but were never hired. Subsequently, two other black carpenters were hired, the first a member of the union, and the second a non-union member recommended by the first.

Petitioner Newsome filed an unfair labor practices charge against Mason-Rust with the National Labor Relations Board on May 2, 1968. The charge was amended October 23, 1968 to allege that Mason-Rust had also discriminated against petitioner Criswell.

The Board found that Mason-Rust violated Section 8 (a)(1) of the Act by denying employment to petitioners because of their engagement in protected concerted activities. It required Mason-Rust to cease and desist, to offer Newsome and Criswell immediate employment, to make them whole for any loss and to post notices.

The Board filed a petition for enforcement of its order in the Eighth Circuit Court of Appeals. The jurisdiction of the Eighth Circuit was properly invoked because the unfair labor practices occurred in St. Louis, Missouri.

The Eighth Circuit refused to enforce, with Mr. Justice Heaney dissenting, on the ground that the Board failed to establish, by substantial evidence in the record as a whole, that Mason-Rust failed to hire because of concerted activities.

For reasons not clear on the record, the Board failed to appeal or seek a writ of certiorari. Prior to this time petitioners had relied on the government attorneys to

protect their interests, and were unaware of their right to intervene. They had not been advised or notified by counsel or the court of the availability of this procedure to them.

Thereafter, petitioners, on their own behalf through counsel retained by them, sought and timely filed first an application for extension of time to file a petition for a writ of certiorari to the Supreme Court of the United States, and second for leave of court in the Eighth Circuit to intervene for the purpose of petitioning for said writ.

The Eighth Circuit, with Mr. Justice Heaney dissenting, denied the motion to intervene.

Pursuant to Rule 23, Section 5 of the Rules of the Supreme Court of the United States, and because closely related questions are involved, petitioners seek here in a single petition a review on certiorari of the procedural question of their right as charging parties to intervene, and a review of the question of the legality and properness of the decision of the Eighth Circuit in refusing to enforce the Board's order.

REASONS FOR GRANTING WRIT

I. Petitioners contend that they timely filed their motion to intervene, that under the Act and the **Solien** case, quoted below, their right to intervene is a matter of right and is not a permissive matter within the discretion of the Court:

> "By filing charge of unfair labor practice with the National Labor Relations Board charging party becomes full party before the General Counsel in investigative stage, before trial examiner after complaint is issued and with full appellate rights, before the Board on review of trial examiner's decision, in Court of Appeals after Board's decision, **and with right independently to seek certiorari from the Su-**

preme Court". (emphasis ours) NLRB Act, § 8(f)(4) B, 10(1) as amended, 29 U.S.C. § 158 (f) (4) (B), 160 (1); **Solien for and on Behalf of NLRB v. Misc. Drivers and Helpers Union Local No. 610**, 440 F. 2d 124.

In **International Union, UAW, Local 283 v. Scofield**, 382 U.S. 205, this Court held that the National Labor Relations Act, though silent on the subject must be read as intending to confer an absolute right of intervention in a court of appeals on the party who was successful in the proceeding before the Board. Said the Court at page 217:

> "the problem of whether intervention should be granted to the successful charging party to the Labor Board proceedings presents considerations somewhat distinct from the case of the intervening charged party . . . Still, we believe that Congress intended intervention rights to obtain".

II. Joint efforts to end racially discriminatory hiring practices and secure racially integrated working conditions have been recognized as protected activities under Section 7 of the Act. **Tanner Motor Livery**, 148 N.L.R.B. 1402 (1964), approved in this regard, **N.L.R.B. v. Tanner Motor Livery, Ltd.**, 349 F. 2d 1, 3 (C.A. 9, 1965), 419 F.2d 216, 218, 223 (C.A. 9, 1970); see also, **United Packinghouse, Food and Allied Workers International Union, AFL-CIO v. N.L.R.B.**, 416 F.2d 1126, 1134-1135 (C.A.D.C., 1969) cert. denied, 396 U.S. 903. For, as stated by the Supreme Court in a case arising under the Norris-LaGuardia Act (**Negro Alliance v. Sanitary Grocery Co.**, 303 U.S. 552, 561 (1938)):

> "The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion, and the removal of discrimination against them by reason of their race or religious belief is quite as imporant to those concerned as fairness and equity in terms and conditions of employment can be

to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon difference of race or color."

In viewing the issue of discrimination against job applicants rather than incumbent employees, these same principles would apply. This follows from the language of Section 2(3) of the Act which states that the term "employee" shall "include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise." As the Board noted (A 20), "there are no words of special limitation" in Section 7, which defines the rights guaranteed employees by the Act, or in Section 8(a)(1) which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of those rights. For these reasons, this Court has said: "An employer has the right, absent a contract, to pick and choose his employees and hire those he thinks will best suit his business. However, an employer cannot discriminate against an applicant because of his membership in a union or his views on protected activity under the Act." **Reliance Insurance Companies v. N.L.R.B.**, 415 F.2d 1, 6 (C.A. 8, 1969). Accord: **Phelps-Dodge Corp. v. N.L.R.B.**, 313 U.S. 177, 191-193 (1941); **Time-O-Matic, Inc. v. N.L.R.B.**, 264 F.2d 96, 99 (C.A. 7, 1959); **N.L.R.B. v. T.I.L. Sportswear Corp.**, 302 F.2d 186, 189-190 (C.A.D.C. 1962). Compare, **N.L.R.B. v. Texas Natural Gasoline Corp.**, 253 F.2d 322, 325 (C.A. 5, 1958).

The Board found that the Company's conduct in the instant case violated Sec. 8(a)(1) of the Act as the Company failed to hire job applicants Newsome and Criswell because of their persistent, concerted efforts to gain employment at the Gateway plant for themselves and other blacks. That the Company did so does not require direct proof of unlawful motive, but can be established through legitimate inferences drawn from its conduct. **Mead and Mount Construction Co. v. N.L.R.B.**, 411 F.2d 1154, 1157 (C.A. 8, 1969); **N.L.R.B. v. Melrose Processing Co.**, 351 F.2d 693, 698-699 (C.A. 8, 1965); **N.L.R.B. v. Monroe Auto Equipment Co.**, 368 F.2d 975, 980 (C.A. 8, 1966).

Intent is subjective and in many cases the discrimination can be proved only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, the Board is free to draw any reasonable inference. **N.L.R.B. v. Melrose Processing Co.**, *supra*, 351 F.2d at 698. Accord: **Ames Ready-Mix, Inc. v. N.L.R.B.**, 411 F.2d 1159, 1161 (C.A. 8, 1969).

The record in this case is replete with facts and examples of the "run around treatment" accorded Newsome and Criswell and the ultimate affront to them by the Company in hiring two other blacks in their stead. These facts are prima facie evidence that the Company failed to hire them because of their concerted activities, and the burden shifted to the Company to produce a persuasive lawful explanation for their treatment. The record shows that the Company "offered no explanation for its failure to hire Newsome and Criswell" (A 8-14, 28-29).

In this state of the facts a reviewing court may not "displace the Board choice between two equally conflicting views, even though the Court would justifiably have made a different choice had the matter been before it de novo". **N.L.R.B. v. Walton Mfg. Co.**, 269 U.S. 404, 405 (1962); **Universal Camera Corp. v. N.L.R.B.**, 340 U.S. 474, 488 (1951).

In addition, there are special and important reasons for seeking review here, because the present decision weighs heavily and adversely upon not only the two black carpenters who are the petitioners herein, but upon the existing plight of black construction workers in the United States who are members of unions generally, and particularly in the greater metropolitan area of St. Louis, where as recently as December, 1971 and January, 1972, blacks who are construction workers and union members, or eligible to become union members, particularly the unions of the Carpenters, Plumbers and Cement Masons have been victims of discriminatory practices and have been compelled to seek redress in the federal courts in order to be hired for federally supported construction work. See Appendix "E", *infra*; **U.S. v. Intl. Assn. of Bridge, Structural and Ornamental Ironworkers, Machine Movers & Riggers, Local 396, etc., et al.**, No. 71-C 559(2) U.S.D.C., Eastern District, Eastern Division of Missouri; **U.S. v. Tri-County District Carpenters Council**, 6 Cir. C.A., Jan. 4, 1972.

The effect if the present decision of the Eighth Circuit stands, will be to discourage black union members from filing valid complaints of unfair labor practices based on concerted efforts to secure racially integrated working conditions, and thereby foreclose the use of an important remedy and dilute the efficacy of engaging in concerted activities to seek an end to racially discriminatory hiring practices and to secure racially integrated working conditions. Moreover, the decision does violence to a national labor policy which supports fair and equitable conditions of employment on the part of persons of any race.

In the instant case, the court below has failed to give effect to the provisions of Section 10(e) of the Act; the Board's duly conferred jurisdiction has been invaded so that its statutory duties cannot be effectively fulfilled and the plight of black union members and those eligible

to become union members in the construction trades has been substantially retarded at a time when there is a crucial need for the resources and power of government to be positive, responsive and effective in redressing ancient wrongs.

Review by this Court is thus warranted.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted

MARGARET BUSH WILSON
Attorney for Petitioners

February, 1972

Proof of Service

The undersigned hereby certifies that on the 29th day of February, 1972, she served three (3) copies of the foregoing Petition for Writ of Certiorari on Attorneys for the Respondent, Mason and Hanger-Silas Mason Co., Inc. The Rust Engineering Co., a joint venture d/b/a Mason-Rust by mailing said copies by United States Mail, postage prepaid, to Thomas M. Hanna, 1153 Pierre Laclede Building, 7701 Forsyth Boulevard, St. Louis, Missouri, 63105.

The undersigned further certifies that on the same date she served three copies of said Petition herein on the National Labor Relations Board by mailing copies of the Petition herein by United States mail, postage prepaid, to Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D.C.

Margaret Bush Wilson
Attorney for Petitioners

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 20,296

National Labor Relations Board, Petitioner, v. Mason and Hanger-Silas Mason Co., Inc., The Rust Engineering Co., a Joint Venture d/b/a Mason-Rust, Respondent.	On Application for Enforcement of an Order of the National Labor Relations Board.

[October 12, 1971.]

Before MEHAFFY and HEANEY, Circuit Judges, and MEREDITH, District Judge.

PER CURIAM.

The National Labor Relations Board petitions this Court for enforcement of its order against Mason-Rust. The Board's decision and order are reported at 179 N.L.R.B. No. 71, 72 LRRM 1372 (1969). We refuse to enforce.

Mason-Rust was engaged in the renovation of the "Gateway" ammunition plant in St. Louis, Missouri, for the United States Government. In early 1968, it employed about 700 employees, including 70 carpenters. With the

exception of 43 black laborers, four teamsters and two pipefitters, all of its employees were white.

On February 1, 1968, George Newsom and Doyal Criswell, both black members of the Carpenter's Union, discussed seeking employment with Mason-Rust.

The next day, Newsom telephoned Mason-Rust's personnel manager, Milton Hill, to inquire about going to work for Mason-Rust. He was referred to the carpenter foreman.

Thereafter, Newsom went to the job site and talked with Hill. Hill again told Newsom that the union was responsible for the hiring. Newsom then spoke to the president of the Carpenter's Union, who told him that the company did the hiring from a list maintained by union stewards.

On Friday, March 8, Newsom and Criswell went to Mason-Rust's personnel office and saw Hill. Newsom told Hill that the union officers had advised him that the union did not do the hiring. He demanded to be placed on the job as there were no other black carpenters on the job. He pounded the desk and shouted to emphasize his demand. Hill asked Newsom and Criswell if they were union members. Both men showed him their union cards. Hill then instructed the two men to see the carpenter foreman at the gate the next morning at 6:30.

The men did not report the next morning, a Saturday, but did report the following Monday. When they arrived at 7:00 A.M., however, the carpenter foreman had gone to work inside the gate. Criswell left for his job, but Newsom again went to see Hill. Hill refused to call the foreman saying it would be difficult to reach him. Newsom became upset and threatened to picket the plant. He stated he had picketed other places, some of them because of racial discrimination.

Hill denied that Mason-Rust practiced discrimination, and told Newsom to see the carpenter foreman the next day.

Newsom and Criswell were at the plant gate at 6:00 the following morning and met with the foreman. He told them there was a waiting list of 150 job applicants. Newsom replied that the job was a government one, and that no black carpenters had been hired. The foreman replied that the hiring was done at the office.

Newsom then went to see Hill and told him he was being given the runaround. Hill replied that he would have to keep going to the gate each morning to see the foreman. Newsom then stated that he was going to see the government. Newsom returned to see Hill a few days later. Hill said he was busy, and asked Newsom if he had seen the foreman. Newsom again stated he was going to take the matter up with the government.

Newsom then talked with someone in the Corps of Engineers' office at the project. He was given the name of the project manager, Joseph Higgins. Newsom called Higgins and told him his story. Higgins told Newsom that the union did the hiring. Newsom replied that he would have to pursue the matter with the government.

Newsom then called Mason-Rust's home office in Pittsburgh, and related his story. The official who answered told Newsom to contact Higgins again.

On April 2, Newsom met with Higgins and Hill. He told them that he was a charter Negro member of the Carpenters' Local, that he had been conducting an uphill fight to gain employment for blacks in the St. Louis area, and that he wanted to work at the project. Higgins told Newsom to fill out an application, but added that Mason-Rust had laid off 18 carpenters the day before. Newsom replied that Mason-Rust should lay off a white man to

make room for him. Newsom stated that he would picket, if necessary, to get the job.

Newsom returned to the plant several times, but never obtained a job. A number of carpenters had been hired between February 1 and April 2, 1968.

After the April 2 meeting, Higgins called the union and asked that some black carpenters be sent to the job. He told Hill to hire minority group personnel in every job classification if possible. He did not direct that Newsom be hired, however. He explained at the hearing that Newsom had acted in an abusive manner towards Hill, the Corps of Engineers and himself; and that, as a result, he had concluded that Newsom was emotionally unstable and would not make an ideal employee.

Two black carpenters were subsequently hired—the first, a member of the union, and the second, a nonmember recommended by the first.

Newsom filed an unfair labor practice charge with the National Labor Relations Board on May 2, 1968. The Regional Director subsequently issued a complaint against Mason-Rust. The complaint was amended on October 23, 1968, to charge that Mason-Rust had also discriminated against Criswell.

The Board found that Mason-Rust had violated §2(a)(1) of the National Labor Relations Act, 29 U.S.C. §§151 *et seq.*, in denying employment to Newsom and Criswell because of their engagement in protected concerted activities. It required Mason-Rust to grant relief and to post notices.

Mason-Rust contends on appeal that neither Newsom nor Criswell were employees within §2(3) of the Act, that the Board's finding that Criswell was discriminated against was based upon incidents occurring more than six months before the filing of an appropriate charge as required by

§10(b) of the Act, that neither Newsom nor Criswell was engaged in protected concerted activity within the meaning of the Act, and that the failure of Mason-Rust to employ Newsom or Criswell was unrelated to any concerted protected activity.

We find no merit in Mason-Rust's contention that neither Newsom nor Criswell were employees within the meaning of the Act. See, *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941); *Reliance Insurance Companies v. N.L.R.B.*, 415 F.2d 1, 6 (8th Cir. 1969). Nor do we find merit in the contention that the charge, as it related to Criswell, was barred by the six-month statute of limitations. See, *N.L.R.B. v. Hotel Conquistador, Inc.*, 398 F.2d 430, 433 (9th Cir. 1968); *National Labor Relations Board v. Dinion Coil Co.*, 201 F.2d 484, 491 (2nd Cir. 1952).

We consider it unnecessary to decide whether Newsom and Criswell were engaged in concerted activities because we hold that, even if they were, the Board has failed to establish, by substantial evidence in the record as a whole, that Mason-Rust failed to hire them because of such activities.

An employer has a right to hire at will so long as such action is not based on opposition to legitimate union activity. *N.L.R.B. v. Century Broadcasting Corporation*, 419 F.2d 771, 778 (8th Cir. 1969). An inference that a failure to hire an employee was due to his union activity must be based upon evidence, direct or circumstantial, and not on mere suspicion. The burden of proving an improper motive for failure to hire is upon the Board. *Singer Company, Wood Products Division v. N.L.R.B.*, 371 F.2d 623, 624 (8th Cir. 1967). Mason-Rust witnesses testified that their reason for not hiring Newsom was that he missed appointments and used abusive language towards Mason-Rust supervisors on a number of occasions. This conduct led Mason-Rust officials to believe that Newsom

was emotionally unstable and less than a satisfactory employee.

In the face of this largely uncontradicted testimony, we do not believe that the Board was justified in finding that Newsom was denied employment because of his concerted activities.

We also find that there is no substantial evidence on the record as a whole to support the Board's finding that Mason-Rust failed to employ Criswell because of his activities. Little or no evidence was produced by the General Counsel inferring that Mason-Rust failed to hire Criswell because of the role he played in bringing the problem of employment of black carpenters to a head. Indeed, there is not even a showing that Criswell was available for work on the date of the alleged unfair labor practice. The Board acted at best on mere suspicions.

Enforcement will be denied.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent.

Newsom and Criswell had the right, under §7 of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.*, to engage in concerted activities for the purpose of inducing Mason-Rust to employ blacks as carpenters. *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965), *on second appeal*, 419 F.2d 216 (9th Cir. 1970); *United Packinghouse, Food & Allied Wkrs. Int. U. v. N.L.R.B.*, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969). This right, under the circumstances of this case, was not limited by §9 of the Act. There is no evidence that Mason-Rust and the union had any agreement permitting the union to take part in the hiring process. Absent such an agreement, Mason-Rust must be held to have had the final responsibility to hire. See, §8(f) of the Act.

There was substantial evidence to support the Board's finding that Newsom and Criswell were not hired because of their efforts to gain employment with Mason-Rust. Newsom, with some help from Criswell, vigorously pressed his demand that Mason-Rust employ black carpenters. Initially, they were given the "runaround" by Mason-Rust and the union, with each attempting to fix the responsibility for hiring on the other. They pressed their demands so vigorously, however, that Mason-Rust eventually decided to hire some black carpenters. Instead of hiring Newsom and Criswell, however, it hired two other blacks who had not participated in the effort to require Mason-Rust to employ black carpenters. On the basis of these facts, the Board was clearly correct in requiring Mason-Rust to justify its failure to hire Newsom and Criswell, and in finding that Mason-Rust had failed to sustain this burden. The inference drawn by the Board that Mason-Rust's failure to hire Newsom and Criswell was because of their concerted activities was appropriate. See, *Mead and Mount Construction Co. v. N.L.R.B.*, 411 F.2d 1154 (8th Cir. 1969). The record does indicate that Newsom was loud and perhaps even abusive on occasion; but this conduct occurred only after it was apparent that both Mason-Rust and the union were doing their best to avoid the employment of blacks as carpenters. Furthermore, the record shows that Criswell was a model of decorum, was qualified and was a member of the union, yet he too was not hired.

I would grant enforcement.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 20296 September Term, 1971

National Labor Relations Board, Petitioner, vs. Mason and Hanger-Silas Mason Company, Inc., The Rust Engineering Company, a Joint Venture d/b/a Mason-Rust, Respondent.	Application for Enforcement of Order of the National Labor Relations Board

This cause comes before the Court on consideration of a motion filed by George Newsom and Doyal Criswell, the charging parties, requesting leave of Court to intervene as petitioners for the purpose of filing petition for writ of certiorari in the Supreme Court of the United States. The Court has carefully considered the motion together with response thereto filed by counsel for respondent and, being fully advised in the premises, it is now here ordered that the motion for leave to intervene as petitioners for the purpose of filing petition for writ of certiorari in the Supreme Court of the United States be, and it is hereby, denied.

Judge Heaney would have granted the motion.

January 31, 1972

APPENDIX "C"

I

[¶ 21,323] MASON AND HANGER-SILAS MASON COMPANY, INC. et al. and GEORGE NEWSOM.

179 NLRB No. 71, Case No. 14-CA-4664, October 30, 1969, Herry R. Hinkes, Trial Examiner.

Before Fanning, Brown and Jenkins, Jr.

Thomas M. Hanna (McMahon & Berger) and J. Roy Weathersby, Birmingham, Ala., for Employer. George Newsom pro se. Theodore M. Chaskelson and John S. Stevens for NLRB.

Concerted or Protected Activity—Negroes Seeking Jobs—Refusal to Hire

An employer discriminatorily denied employment to two Negro carpenters because of their engagement in protected concerted activities as evidenced by the employer's knowledge that they were seeking employment not only for themselves but for other Negroes. The fact that the employer hired two Negro carpenters at a later date did not establish that the employer's earlier refusal to hire these employees was not due to racial discrimination. Accordingly, the Board did not adopt a Trial Examiner's factual conclusion that the failure to hire two Negroes was not motivated by racial discrimination. Section 8 (a)(1).—Back reference, ¶ 3830.58.

Trial Examiner's Findings and Conclusions

The employer was charged with violating Section 8 (a)(1) of the Act by refusing to hire two Negro employees because of their engagement in protected concerted activities.

Two union carpenters, Newsom and Criswell, both Negroes, went to the employer's construction site to seek employment. When they first spoke to the job foreman they were told that there were no colored employees on the premises. In a later meeting with the foreman they let it be known that they were seeking employment for themselves and for other Negroes because the employer did not have any on the job.

The two men then went to the Corps of Engineers' office to complain that the employer was not hiring Negro carpenters. From there they were sent to the office of the project manager. At this meeting they informed the project manager that they had been working in behalf of getting employment for Negro carpenters in the St. Louis area. The manager promised to look into the situation but told them that eighteen employees had been laid off just the day before.

Thereafter, the project manager instructed the foreman to hire minority group personnel in all craft classifications. Neither Newsom nor Criswell were hired by the employer. They were told that there were no present vacancies. Several weeks later the employer hired two Negro carpenters but not Newsom or Criswell.

It is concluded that Newsom and Criswell were discriminatorily denied employment because of their engagement in protected concerted activities. Both employees had met with the job foreman and consulted concerning the employer's hiring practices and their chances of getting employment as carpenters. They had met with the personnel manager and demanded that the employer hire Negro carpenters. The totality of the evidence showed that the two employees were working together. Moreover, as a result of the prodding by Newsom and Criswell, the employer began vigorous efforts to employ Negro carpenters. In fact, two were hired shortly thereafter.

The employer's contention that it did not know these employees were engaged in concerted activities was rejected. The personnel manager was advised by Newsom in the presence of Criswell that the company employed no Negro carpenters and it should have done so. Similar advice was given to the carpenter foreman. Finally, the project manager learned of the concerted activity when he met with the two employees and they informed him that they had been working for the employment of Negro carpenters in the area.

It was also concluded that inasmuch as two other Negroes were hired, the employer was not motivated by racial discrimination.

Board's Decision

The Board adopts the findings, conclusions and recommendations of the Trial Examiner as modified herein.

The Board does not adopt the Trial Examiner's subsidiary factual conclusion that the failure to hire two Negro carpenters was not motivated by racial discrimination. The mere fact that the employer hired two Negro carpenters at a later date did not necessarily establish that the employer's earlier refusal to hire Newsom and Criswell was not due to racial discrimination. This is especially true in view of the fact that the concerted activities engaged in by the two employees involved seeking a change in the employer's hiring practices in order to get employment for themselves and other Negro carpenters.

The Board concurs with the Trial Examiner's principal finding that the employer's refusal to hire Newsom and Criswell was because of their concerted protected activities.

II

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, I recommend that the Respondent, Mason and Hanger-Silas Mason Co., Inc. The Rust Engineering Company, a joint venture d/b/a Mason-Rust, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to employ applicants because they have engaged in concerted activities for their mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization to form labor organizations, to join or assist any labor organization and to engage in any other concerted activities for the purpose of collective bargaining or any other mutual aid or protection or to refrain from any and all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer George Newsom and Doyal Criswell, in that order, immediate employment as carpenters at its St. Louis project, if Respondent still needs carpenters on that project, without prejudice to such seniority or other rights and privileges as each would have enjoyed had he been hired on March 16, 1968, discharging, if necessary, any carpenter hired on that project on or after March 16, 1968 and make them whole for any loss each of them may have suffered by reason of the discrimination against each of them in the manner set forth in the section of the above Decision entitled "The Remedy."

(b) Upon request, make available to the Board or its agents for examination, a copy of all payroll records, social security payment records, timecards, personnel records and reports and all other records relevant and necessary to a determination of compliance with (a) above.

[21] (c) Post in conspicuous places, at its project in St. Louis, including all places where notices to employees are customarily posted, copies of the notice attached hereto and marked "Appendix."[6] Copies of said notice on forms provided by the Regional Director for Region 14, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing within 20 days from the date of this Recommended Order, what steps the Respondent has taken to comply herewith.[7]

Dated at Washington, D. C., April 17, 1969.

/s/ Harry R. Hinkes
Trial Examiner

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[6] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[7] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Fourteenth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

III

[Caption Omitted in Printing]

179 NLRB No. 71 Case 14-CA-4664
D-3299
St. Louis, Mo.

DECISION AND ORDER

On April 17, 1969, Trial Examiner Harry R. Hinkes issued his Decision in the above-proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and supporting brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified herein.[1]

---

[1] In finding that the Respondent had discriminatorily denied employment to two Negro carpenters, Newsom and Criswell, because of their engagement in protected concerted activities, the Trial Examiner also concluded that inasmuch as two other Negro carpenters were hired, the Respondent was not motivated by racial discrimination. However, the Trial Examiner had earlier found, and we agree, that the protected concerted activities engaged in by Newsom and Criswell involved seeking a change in Respondent's hiring practices in order to get employment for themselves and other Negro carpenters. Moreover, the mere fact that Respondent hired two Negro carpenters at a

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Mason and Hanger-Silas Mason Co., Inc., The Rust Engineering Company, a joint venture, d/b/a Mason-Rust, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., October 30, 1969.

JOHN H. FANNING, Member
GERALD A. BROWN, Member
HOWARD JENKINS, JR., Member
NATIONAL LABOR
(Seal) RELATIONS BOARD

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later date does not necessarily establish that Respondent's earlier refusal to hire Newsom and Criswell was not due to racial discrimination. Accordingly, we do not adopt the Trial Examiners subsidiary factual conclusion that the failure to hire Newsom and Criswell was not motivated by racial discrimination. Our decision herein is grounded solely on the Trial Examiner's principal finding, in which we concur, that the Respondent's refusal to employ Newsom and Criswell was because of their concerted protected activities. See, **Tanner Motor Livery, Ltd.**, 148 NLRB 1402 at 1403-4.

APPENDIX "D"

I

Federal Rules of Appellate Procedure, Rule 15 (d), Title IV

TITLE IV. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS

Rule 15. Review or Enforcement of Agency Orders—How Obtained; Intervention

(a) PETITION FOR REVIEW OF ORDER; JOINT PETITION. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) APPLICATION FOR ENFORCEMENT OF ORDER; ANSWER; DEFAULT; CROSS-APPLICATION FOR ENFORCEMENT. An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

(c) SERVICE OF PETITION OR APPLICATION. A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

(d) INTERVENTION. Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the

interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

II.

Rule 23, Section 5, Rules of the Supreme Court of the United States

* * * * * * *

5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases.

III

Subchapter II.—National Labor Relations

Subchapter Referred to in Other Sections

This subchapter is referred to in sections 142, 1014 of this title; title 18 section 1951; title 39 section 1209.

§ 152. Definitions.

When used in this subchapter—

* * * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or

any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title. (July 5, 1935, ch. 372, § 7, 49 Stat. 452; June 23, 1947, ch. 120, title I, § 101, 61 Stat. 140.)

AMENDMENTS

1947—Act June 23, 1947, restated rights of employees to bargain collectively and added provision that they have the right to refrain from joining in concerted activities with their fellow employees.

EFFECTIVE DATE OF 1947 AMENDMENT

Effective date of act June 23, 1947, see note set out under section 151 of this title.

COMMUNIST ORGANIZATIONS, AND MEMBERS

Prohibitions placed on Communist organizations, and members thereof, with respect to labor, see chapter 23 of Title 50, War and National Defense, particularly sections 782 (4A), 784, 792a and 841 to 844 of that title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 158, 158a, 433 of this title; title 50 section 792a.

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

* * * * * * * *

§ 160. Prevention of unfair labor practices.

* * * * * * *

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable.

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: **Provided**, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is

made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(e) Petition to court for enforcement of order; proceedings; review of judgment.

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdic-

tion of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

APPENDIX "E"

Excerpts From St. Louis Post-Dispatch of Wednesday, December 1, 1971, Final * * * Stock Market Up, Closing Prices Pages 5E and 6E

BLACK HIRING ACCORD

Plumbers Union Local 35 and Cement Masons Local 527 agreed today to hire sufficient blacks over the next three years to achieve a 17 per cent integration rate.

In a consent decree signed by United States District Judge John K. Regan, the plumbing union agreed to hire 128 black workers and the stone masons agreed to hire 85 into the trade over the period. The Plumbers Joint Apprenticeship Committee also has agreed to the order.

The decree grew out of a suit filed in September against six unions and eight contractor groups in the construction industry, alleging that the unions and contractors "had pursued a policy of discriminating against black workers because of their race. This has applied both to union membership and employment opportunities in the prospective trades," the Government's petition said.

The suit asked that the court order the unions to stop failing or refusing to admit blacks to membership on the same basis as whites. It asked also that the unions be ordered to stop discriminating against blacks in the matter of referral to jobs, of providing equal work opportunities and in admission to training programs.

Both unions are to establish minority training programs for persons over the age of 26. Local 35 is to admit 40 trainees in the next six months and a total of 120 over the next two and one half years. Local 527 agreed to admit 20 trainees initially and a total of 60 over the same period.

The unions were authorized to drop the training program when the 17 per cent integration figure was reached.

The Plumbers Joint Apprenticeship Committee was ordered to maintain separate lists of qualified black and qualified white applicants for training. Until the three-year decree terminates or until the 17 per cent figure is achieved, the committee is to choose apprentices from the lists at the ratio of two blacks for every three whites chosen.

Detailed records of the hiring program, referrals, hours worked by members of both races and information on those reaching journeyman status are to be provided by the unions at six-month intervals. The decrees contain lists of organizations where trainees might be solicited and lists of names of prospective trainees who should be given first consideration in the program.

Andrew J. Ruzicho, attorney in charge of the local office of the Department of Justice, Civil Rights Division, said that one other union was negotiating toward settlement but three other unions named in the suit have not. By agreeing to the decree, the two unions avoided continuation of the suit charging discrimination in hiring.

The attorney said that the agreement would make it easier for contractors to comply with federal hiring policies because more qualified blacks would be available.

Raymond I. Harris, who represents the contractors named in the suit, said that the group submitted a motion about a month ago asking that the court dismiss them because no charges were made specifically against the contractors.

"The contractors are willing to co-operate in any way," Harris said. "But we're saying we're not parties to any consent decree. That's up to the unions. The decree obviously will help, because there will be more blacks for the contractors to hire."

Excerpts From St. Louis Post-Dispatch of Sunday, January 9, 1972

EAST SIDE CARPENTERS FACE ORDER ON BIAS

East Side carpenters will be confronted with a new demand from a federal court this week to refrain from discriminating against Negroes in hiring for federally supported construction work.

The United States Court of Appeals, sitting in Chicago, reversed a decision in which a United States district judge in East St. Louis, William G. Jurgens, ruled in favor of Locals 169 and 480 of the United Brotherhood of Carpenters and Joiners in a dispute over training and hiring.

The higher court suggested that Juergens might issue a permanent injunction prohibiting interference with the rights of black carpenters. The appellate judges noted that only 39 of the 550 members of Local 169 were black and that only one of 367 members of local 480 was black.

In a ruling last April 8, Juergens refused to issue an injunction sought by the Department of Justice to prevent carpenters from walking off the job when black trainees appeared for work.

The carpenters had walked off the job the previous Nov. 17 after the unions were ordered to put to work a Negro trained under the so-called Ogilvie Plan, named for Illinois Gov. Richard B. Ogilvie.

Juergens said the evidence presented by the Government fell short of establishing discrimination against blacks. The suit was prepared in Washington and its filing was announced by Attorney General John N. Mitchell.

The government case was presented by Andrew J. Ruzicheo, of the civil rights division of the Department of Justice. He said the court of appeals decision should provide equal employment opportunities for blacks in the East St. Louis area.

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OCTOBER TERM, 1971

71-1108

No. A-506

GEORGE NEWSOME and DOYAL CRISWELL,
Petitioners,

v.

MASON & HANGER-SILAS MASON CO., INC., THE RUST ENGINEERING COMPANY, a Joint Venture, d/b/a MASON-RUST,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. A-806

GEORGE NEWSOME and DOYAL CRISWELL,
Petitioners,

v.

MASON & HANGER-SILAS MASON CO., INC., THE RUST ENGINEERING COMPANY, a Joint Venture, d b a MASON-RUST,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A7) is reported at 449 F.2d 425. The Board's decision and order (Petition A9-A15) are reported at 179 NLRB 434.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1971. This Court does not have jurisdiction of this action under 28 USC 1254(1) as only a party to an action before the United States Court of Appeals may be granted certiorari and the Petitioners herein are not, and have never been, a party to this action.

QUESTIONS PRESENTED

1. Whether or not the Petitioners are now entitled to intervene in a matter which was argued and submitted before the Court of Appeals by the original parties, and said Court decided the case, all before Petitioners attempted intervention?

2. Whether or not the findings of the National Labor Relations Board that Newsome and Criswell were unlawfully refused preferential hiring are supported by substantial record evidence?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 73 Stat. 519, 29 USC 151 et seq.) are set forth at pages A18-A22 of the petition; the relevant provisions of the Federal Rules of Appellate Procedure for United States Court of Appeals are set forth at pages A16-A18 of the petition; and some of the relevant provisions of the Rules of the Supreme Court of the United States are set forth on page A18 of the petition. 28 USC 1254(1) is set out in Appendix "A", *infra*.

STATEMENT

Respondents were a joint venture engaged in the process of converting an abandoned foundry into a plant for the manufacture of artillery shells pursuant to a contract with the Corps of Engineers of the United States Army (JA 4-5).[1]

The hiring of employees was done by the foreman of each of the several crafts working on the project. The carpenter foreman, as other craft foremen, was designated by the Carpenters' Union. The Carpenters' Union had a collective bargaining agreement with Respondents covering the carpenter unit (JA 251).

---

[1] "JA" refers to the Joint Appendix filed in the court below.

Newsome, a Petitioner herein, by his own admission quit a steady union job to apply for work at Respondents' job site (JA 257). Newsome's self asserted reason for quitting his employment was to "get on the gravy train." Newsome applied for work by telephoning the personnel manager who told him that hiring was done by the carpenter foreman at the job site, and the latter arranged for Newsome to meet the foreman on the following day (JA 85). Newsome missed that appointment (JA 85). The day following, Newsome appeared in the personnel manager's office accompanied by Criswell (JA 86). Newsome introduced Criswell as a journeyman carpenter but Criswell never took the stand to establish his qualifications. Newsome became belligerent and demanded that he be hired and the personnel manager made an appointment for Newsome and Criswell to meet the carpenter foreman the following morning (JA 86-87). Newsome missed the meeting because he was at least twenty-five (25) minutes late for the meeting, and Criswell did not appear (JA 87-88).

A third appointment was made for Newsome which he kept (JA 88). Newsome was told that 150 men were ahead of him on the list and he would have to wait his turn (JA 147 and 167). Newsome left the number of a pay telephone at "Tony's Tavern" with the carpenter foreman for purposes of making future contacts (JA 196-97).

Almost one month later Newsome appeared at the job with one Duffy, whom he represented to be a laborer (JA 256 and 300). The meeting had been arranged after Newsome called corporate headquarters in Pittsburgh (JA 255). Newsome was told that 18 carpenters had just been laid off, but he asserted that he had quit a good job to "get on the gravy train" and demanded that as a Negro he be given preference in hiring. Newsome was advised that the Respondents would consider his claim (JA 257-58).

The next day Newsome telephoned Respondents' project manager and cursed and insulted him at length (JA 262-263). The project manager contacted the Union and found that Negro carpenters could be located and he instructed the Union that Negroes were to be hired for the next available jobs (JA 259-61). Newsome was not removed from the foreman's list, nor did he receive preferential treatment in hiring as the Respondents considered him to be emotionally unstable (JA 86-87 and 262-63). The carpenter foreman subsequently attempted to hire Newsome when his name came up on the list but Newsome could not be reached (JA 210-211).

The National Labor Relations Board found the Respondents had failed to carry the burden of proving that they did not discriminate against Newsome and Criswell by the failure to hire them before hiring two other Negroes as it presented no "credible" explanation or excuse (JA 29). The Board made no attempt to prove that Newsome was not called when his turn came. The United States Court of Appeals for the Eighth Circuit recognized the Respondents had asserted Newsome's failure to keep appointments and his abusive manner as a reason for not granting him preference, and the Court held that it was the Board which failed to sustain the burden of proof. As for Criswell the Court found there was "little or no evidence" of a refusal to hire because of his "concerted activities" (Pet. App. A-6).

The Board filed its application for enforcement on May 8, 1970, and subsequent thereto an answer, joint appendix, and briefs were filed. The cause was argued on December 15, 1970, and judgment rendered on October 12, 1971. Petitioners moved to intervene at the Court of Appeals level on January 12, 1972, and the motion was denied January 31, 1972.

REASONS FOR DENYING THE WRIT

I. Petitioners Have No Right to a Writ of Certiorari as They Chose Not to Participate in This Case Until Such Time as It Was Resolved Against Them.

Respondents contend that the Petitioners have no right to seek certiorari, nor does this honorable Court have the right to grant certiorari as 28 USC, Sec. 1254(1) authorizes a writ only upon the petition of a party to the action and Petitioners are not a party in this case. Petitioners did not participate at the Court of Appeals level because they failed to intervene in a timely fashion. Moreover, 29 USC, Sec. 160(e), relied upon by Petitioners, confers no jurisdiction independent of the aforecited 28 USC, Sec. 1254(1) and may not be relied upon to support the Petitioners' prayer.

Petitioners contend that it is their absolute and unrestricted right to intervene in this action, relying upon **Solien v. Drivers et al., Local No. 610**, 440 F.2d 124 (CA 8, 1971); and **UAW Local 283 v. Scofield**, 282 U.S. 205. Respondent would not deny Petitioners the right of intervention so long as the same was timely in nature. The cases relied upon by Petitioners do not establish any right to intervene **after** judgment or otherwise excuse them from the obligation to comply with Rule 15(d) FRAP, which requires that the motion to intervene be filed within thirty (30) days of the filing of the petition for review. The petition for enforcement was filed on May 8, 1970, the case argued on December 15, 1970, and judgment rendered on October 12, 1971; all before the motion to intervene was filed. The fact that the **Scofield** case was grounded upon a policy of avoiding multiple appeals underscores the need to here deny the petition for the same reason. To grant the writ would encourage every charging party to await

the outcome of every court decision, and the Board determination to seek certiorari, and only then participate in the case and thus secure a "second bite at the apple." Indeed, had Petitioners chosen to participate in the action below, the Court of Appeals might well have put a great many awkward questions to their counsel. Therefore, the writ should be denied for the reason that this honorable Court now has no jurisdiction over the case because of Petitioners' failure to intervene and become a "party."

II. The Counsel for the General Counsel of the National Labor Relations Board Failed to Prove That Any Unlawful Act of Discrimination Occurred With Respect to Newsome and Criswell.

Respondents contend that Petitioners were not engaged in concerted protected activity, nor were they the objects of unlawful discrimination.

The acts of Newsome (for those of Criswell have never been established beyond the most passive of roles), at best, show that he was a "self-appointed" guardian of his fellow black carpenters. This position was usurped at the expense of the Carpenters' Union which was the **exclusive** collective bargaining representative of the Carpenter employees of Respondents. It is now the position of the Board[2] that employees who are represented by a union, and who engage in misconduct when purporting to represent a segment of the bargaining unit, lose the protection of the Act because to hold otherwise would undermine the entire scheme of collective bargaining to the prejudice of both employees and employers. **The Emporium**, 192 NLRB No. 19, 77 LRRM 1669 (1971). This line of reasoning fol-

[2] As contrasted with the Board's position at the time it decided this case. See **NLRB** v. **Tanner Motor Livery**, 419 F.2d 216 (CA 9, 1969).

lows that of the United States Court of Appeals for the Ninth Circuit in the **Tanner** case, *supra*, which denied enforcement of a Board Order for the reinstatement of two employees discharged for picketing to protest the employer's failure to hire Negroes.

In **Tanner**, the Ninth Circuit relied upon this Court's decisions in **NLRB v. Allis-Chalmers Manufacturing Co.**, 388 U.S. 175 (1967), and **Scofield v. NLRB**, 394 U.S. 423 (1969), in which a union's right to impose the will of the majority, upon **all** members was affirmed, and held that the union had not sanctioned the acts of the discharged employees, those acts were contrary to the established contract between the company and the union, and therefore, the picketing was unprotected. Here Newsome may have threatened to picket (accompanied by his family—not by Criswell) but such picket had not been sanctioned by the union, it was in breach of contract, and it was a threat made in an attempt to contravene the company-union established hiring procedure. Therefore, under existing Board law, and in the opinion of the only Court of Appeals to have expressed itself on this matter, Newsome and Criswell were not engaged in protected concerted activity.

Even if the law were otherwise, Newsome and Criswell were not shown to be the objects of discrimination in hiring. To be certain, other Negroes were preferred to Newsome but that was because of his obnoxious, irrational, and belligerant behavior rather than the color of his skin or the alleged object of his protestations. Moreover, it would hardly seem to meet the concept of discrimination to assert that Respondents had the obligation to single out and **prefer** Newsome to other carpenters.

The Board failed to dispute the Respondents' proof that Newsome was called in his turn, but could not be reached; nor did it dispute Respondents' proof that others were

ahead of Newsome and Criswell. Newsome **only** asserted that **he** was not hired. It should not be surprising that Newsome did not respond to the call to work as the only number he left was that of a pay telephone in "Tony's Tavern".

The Board did not call Criswell to the stand to establish that he and Newsome were acting in concert to secure the hiring of themselves or of Negroes generally.

The Board did not establish that Criswell had the qualifications of a journeyman carpenter. Nor did Criswell so assert to the Respondents at any time. The Board did not even prove that Criswell was ready, willing and able to go to work!

Finally, the Board failed to prove that Respondents were aware of the alleged concerted protected activity of Newsome and Criswell notwithstanding this Court's clear pronouncement:

> "In sum, §8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such . . ."[3]

Thus, all that Respondents could possibly know was that Newsome, and on one occasion Criswell, had applied for work. Criswell was not the least offensive or threatening and soon he was completely obscured from Respondents.

CONCLUSION

Petitioners pray for a writ and ultimate reversal of the Appeals Court decision to encourage black efforts to integrate the construction trade work forces. While the ultimate goal is most worthy, it cannot be advanced at the

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[3] **NLRB v. Burnup and Sims, Inc.**, 379 U.S. 21 at page 28.

expense of an innocent party, nor should it be a windfall for a wholly undeserving individual who is attempting to ride a "gravy train" merely because he is "black". At a time when the power and majesty of the federal government and the several states are faltering in their attempts to end the most patent forms of discrimination in the building trades, no justice will be done by pursuing an employer who has done his best to comply with the law of the land and his defense agency contracts, and who has done nothing to discriminate against any man.

Respectfully submitted :

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APPENDIX "A"

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§1254(1) COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"